March 19, 1999

D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-J

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies.

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I. INTRODUCTION

This arbitration proceeding is held pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252 ("Act"). The proceeding is a consolidated arbitration between New England Telephone and Telegraph Company, d/b/a/ Bell Atlantic-Massachusetts ("Bell Atlantic") and formerly as NYNEX, the incumbent local exchange carrier ("ILEC"), and its competitors: AT&T Communications of New England ("AT&T"); Brooks WorldCom, Inc. ("Brooks"), formerly Brooks Fiber Communications of Massachusetts, Inc.; MCI WorldCom, Inc. ("MCI WorldCom"), formerly MCI Telecommunications Corporation; Sprint Communications Company L.P. ("Sprint"); and Teleport Communications Group, Inc. ("Teleport"). Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94.[(1)]

On March 13, 1998, the Department of Telecommunications and Energy ("Department") issued an Order in this proceeding concerning the provision of unbundled networks elements ("UNEs")[(2)] by Bell Atlantic to the competitive local exchange carriers ("CLECs"). Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-E (1998) ("Phase 4-E Order").[(3)] The Department ruled that, in light of a 1997 decision by the United States Court of Appeals for the Eighth Circuit ("the Eighth Circuit Decision"),[(4)] the Department would not require Bell Atlantic to combine UNEs on behalf of competing carriers in the manner prescribed by the FCC, but deemed by the Court to exceed FCC authority under the Act. Phase 4-E Order at 11.

However, we further found that Bell Atlantic's refusal to provide such combinations would impair the successful introduction of competition in Massachusetts, and, in particular, would "not advance our or the Act's policy to create efficiency-enhancing conditions that would allow local exchange competition to develop and to deliver price and service benefits to customers." Id. at 12-13. We expressed reservations as to whether Bell Atlantic's requirement that CLECs use collocation as the sole method to combine UNEs was consistent with the Act and the Eighth Circuit's findings. Id. at 13-14. We proposed that, unless Bell Atlantic could demonstrate that its collocation requirement was

consistent with the Act and the Eighth Circuit's finding, it should develop an additional, alternative or supplemental method for provisioning UNEs in a way that permitted recombination by competing carriers but without imposing a facilities requirement on those carriers. Id. at 14. Finally, we noted that Bell Atlantic's refusal to provide UNEs in a way that contributes to efficiency and in a manner conducive to the development of local exchange competition could raise a serious problem in the Department's review of any subsequent request by Bell Atlantic approval to offer inter-LATA long distance service under Section 271 of the Act. Id. at 13-15.

After a round of negotiation attempts by the parties, the Department directed the parties to file their proposals for an arbitrated solution to the UNE-combinations issue. Bell Atlantic filed a proposal on April 17, 1998, in which it offered some revisions to its previous UNE combinations policy, and the CLECs responded to Bell Atlantic's proposals and offered some of their own. Evidentiary hearings were held on May 1, May 15, July 2, July 20, and September 10, 1998.[(5)] Bell Atlantic, AT&T, MCI, and Sprint presented witnesses. Briefs were filed by Bell Atlantic, AT&T, and MCI on September 28, 1998, and reply briefs were filed on October 8, 1998.[(6)]

On January 25, 1999, the Supreme Court of the United States reversed the Eighth Circuit on several key points (see below). AT&T Corp. et al. v. Iowa Utilities Board et al., No. 97-826, slip op. (U.S. January 25, 1999) ("AT&T Corp."). On January 26, 1999, the Arbitrator in the instant matter asked the parties to submit comments on the implications of the Supreme Court's decision to the questions before him. Comments were filed on February 9, 1999 by Bell Atlantic, AT&T, MCI WorldCom, and Sprint, and reply comments were filed by Bell Atlantic, AT&T and MCI WorldCom on February 18, 1999.

II. EFFECT OF THE SUPREME COURT DECISION

A. Introduction

The Supreme Court ruled on two issues germane to the present proceeding. First, it reversed the Eighth Circuit's ruling on the issue of already-combined UNEs, and concluded that the FCC did not err in establishing Rule 315(b), which prohibits an incumbent from separating already-combined network elements before leasing them to a competitor.[(7)] AT&T Corp. at 25-28. See also, 47 C.F.R. § 51.315(b). As noted by the Court,

> the rule the Commission has prescribed is entirely rational, finding its basis in Section 251(c)(3)'s nondiscrimination requirement. . . . It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In the absence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.

Id. at 27-28.

The Court also overruled the Eighth Circuit's ruling on the validity of Rule 319, which designated the range of UNEs to be provided to CLECs. Id. at 19-25.

We are of the view, however, that the FCC did not adequately consider the "necessary and impair" standards when it gave blanket access to these network elements, and others, in Rule 319. That rule requires an incumbent to provide requesting carriers with access to a minimum of seven network elements: the local loop, the network interface device, switching capability, interoffice transmission facilities, signaling networks and call-related databases, operations support systems functions, and operator services and directory assistance . . . .

The Commissions's premise was wrong. Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the "necessary" and "impair" requirements.

Id. at 20, 24. The Court vacated Rule 319 and remanded this section of the rules to the FCC for further consideration.[(8)]

B. Positions of the Parties

1. Bell Atlantic

Bell Atlantic focuses on the fact that the Supreme Court vacated Rule 319, which was the FCC's rule defining the network elements that must be unbundled. Bell Atlantic argues that the Department should terminate this proceeding without making further findings until the FCC completes its rulemaking to determine which UNEs must be unbundled after applying the "necessary and impair" standards (Bell Atlantic Comments at 3, 5-6). According to Bell Atlantic, the Department cannot and should not act until the FCC takes action because the Supreme Court sent this issue back to the FCC[(9)] (id. at 5-6; Bell Atlantic Reply Comments at 3). Bell Atlantic asserts that it is under no obligation to combine network elements that are not currently combined,[(10)] and that it would not be required to provide the UNE-platform[(11)] if the FCC determines that one or more of the network elements making up the UNE-platform do not meet the "necessary or impair" standards (Bell Atlantic Comments at 5, 7 n.4). Further, according to Bell Atlantic, whether the UNE-platform is an existing combination of elements under the FCC's rules requires a factual determination that each component of the platform constitutes a

network element under the "necessary and impair" standards. Bell Atlantic concludes that there is no record evidence on which to make this factual determination (Bell Atlantic Reply Comments at 3).

2. AT&T

AT&T argues that the Department should order Bell Atlantic (1) to provide any and all combinations of UNEs, including the UNE-platform, to all CLECs on request; (2) to combine network elements for CLECs in the same manner it combines elements for itself, or in any other technically feasible manner requested by a CLEC; (3) not to require CLECs to collocate as a precondition to obtaining access to any UNE or UNE combination; and (4) not to take apart or disconnect any existing combinations of UNEs unless requested to do so by a CLEC (AT&T Comments at 2). AT&T also asserts that Bell Atlantic may not assess any "glue charges" that are not based on the TELRIC method[(12)] for combinations (id. at 2, 6). According to AT&T, the Department should require UNE combinations based on the definitions contained in AT&T's interconnection agreement and based on definitions that all parties in the Consolidated Arbitrations have agreed from the start of this proceeding should be used[(13)] (AT&T Reply Comments at 7). AT&T notes Bell Atlantic's written commitment to the FCC on February 8, 1999, where Bell Atlantic represented that it would "continue to make available each of the individual network elements defined in the now-vacated FCC rules and [its] existing interconnection agreements" (id. at 8, citing Letter from Edward D. Young III, General Counsel, Bell Atlantic Corporation, to Lawrence Strickling, Chief of the FCC's Common Carrier Bureau, dated February 8, 1999).

3. MCI WorldCom

MCI WorldCom argues that the Department should require Bell Atlantic to provide UNE combinations, including the UNE platform , and that Bell Atlantic should provide these combinations free of "glue charges" and time and use restrictions (MCI Comments at 2, 5-7). In response to Bell Atlantic's contention that it is not obligated to provide any network elements until the FCC completes its rulemaking identifying those network elements that must be unbundled, MCI WorldCom notes that five of the seven elements originally identified by the FCC must be unbundled and provided according to Section 271 requirements (MCI Reply Comments at 4). MCI WorldCom concurs with AT&T that Bell Atlantic must provide the network elements defined in its interconnection agreement and must honor its February 8, 1999 commitment to the FCC (id. at 5-6). Because Bell Atlantic has not provided a nondiscriminatory, efficient means for CLECs to combine network elements, MCI WorldCom argues Bell Atlantic must do the combining itself (id. at 9).

4. Sprint

Sprint argues that the Department should rule that Bell Atlantic is precluded from separating already combined UNEs and is obligated under the Act and the FCC's rules

implementing the Act to offer UNE combinations to CLECs, including the UNE-platform (Sprint Comments at 2-3).

C. Analysis and Findings

Bell Atlantic relies primarily on the Supreme Court's remand of Rule 319 as the grounds for its argument that the Department should terminate this proceeding. In essence, Bell Atlantic argues that the specific UNEs to which the Supreme Court's combination language would apply are undetermined because the FCC has yet to complete the Rule 319 remand. Until that occurs, argues Bell Atlantic, it need not offer any combination of UNEs. The CLECs interpret the Supreme Court's decision as requiring Bell Atlantic to offer the UNE platform of services or any parts thereof, as provided for in the interconnection agreements that were written prior to the Eighth Circuit decision. The CLECs also cite a February 8, 1999, letter from Bell Atlantic to the FCC, in which Bell Atlantic commits to providing each of the individual network elements defined in the now-vacated FCC rules and existing interconnection agreements.

Bell Atlantic's own actions determine our ruling on this matter. We hold Bell Atlantic to the commitments it made to the FCC in its February 8, 1999 letter where it stated that it will continue to offer the UNEs contained in Rule 319 and in existing interconnection agreements. Each of the Department-approved interconnection agreements between Bell Atlantic and the parties in this case includes a clear statement that Bell Atlantic will provide the full list of FCC-designated UNEs to the CLECs. These interconnection agreements also provide that Bell Atlantic will provide dark fiber, a UNE on which the FCC deferred to state action and one that this Department ordered Bell Atlantic to provide. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 3, at 49 (1996). Thus, pending a final order in the FCC's Rule 319 remand proceeding, the Department expects that Bell Atlantic, consistent with its February 8, 1999 representation to the FCC, will make available the UNEs included in the Rule 319 UNE list and in existing interconnection agreements, to carriers with interconnection agreements and to carriers that seek that list during new negotiations. Further, as required by the Supreme Court decision and consistent with the above directive, Bell Atlantic shall make existing combined UNEs, including the UNE platform, available to all CLECs in their combined form.[(14)] In addition, the interconnection agreements do not provide for a fee for maintaining an existing combination of UNEs (i.e., a "glue charge"), and accordingly no such fee shall be assessed.[(15)] Finally, the Department will shortly issue a ruling on Bell Atlantic's obligations to combine individual UNEs not already combined.

III. ORDER

Accordingly, after due consideration, it is

ORDERED: That Bell Atlantic shall make available to competing carriers the UNEs included in the Rule 319 UNE list and in existing interconnection agreements; and it is

FURTHER ORDERED: That Bell Atlantic shall make available to competing carriers existing combined UNEs, including the UNE platform, in their combined form, without a "glue charge"; and it is

FURTHER ORDERED: That all carriers shall comply with all other directives contained herein.

By Order of the Department,

_____

Janet Gail Besser, Chair

_____

James Connelly, Commissioner

_____

W. Robert Keating, Commissioner

_____

Paul B. Vasington, Commissioner

_____

Eugene J. Sullivan, Jr., Commissioner

1. Since the start of these arbitrations, AT&T acquired Teleport, and MCI WorldCom acquired Brooks. AT&T assumed representation for Teleport and MCI WorldCom assumed representation for Brooks. Thus, the remaining parties are Bell Atlantic, AT&T, MCI WorldCom, and Sprint.

2. UNEs are parts of the telephone network that one carrier leases from another carrier to provide telecommunications services. See 47 U.S.C. § 251(c)(3).

3. On April 30, 1998, the Department issued an Order denying MCI's Motion for Reconsideration and Petition to Open an Investigation. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-F (1998).

4. Iowa Utilities Board , et al., Petitioners v. Federal Communications Commission; United States of America, Respondent, 120 F. 3d 753 (8th Cir., July 18, 1997, as amended on rehearing on October 14, 1997) (1997). The Eighth Circuit Court vacated, inter alia, the Federal Communications Commission's ("FCC") rule requiring ILECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carrier on an unbundled basis. Id. at 813. The Eighth Circuit found that these rules could not "be squared with the terms of subsection 251(c)(3)." Id.

5. In addition, the Arbitrator ruled on an evidentiary issue at a hearing on August 20, 1998.

6. The Arbitrator directed the parties to brief the following question: "Are Bell Atlantic's proposals with regard to UNE combinations consistent with the Department's March 13th Order, and are there alternative proposals which, while consistent with the Department's Order, might serve to better accomplish the goals of the Act?" (Tr. 34, at 172; Tr. 38, at 16-17). The Arbitrator also asked Bell Atlantic to address the question of whether it was willing to hold in abeyance its current policy of not combining UNEs pending the outcome of the Supreme Court's review of the Eighth Circuit Decision (Tr. 40, at 123), or until there had been a collaborative effort to evaluate fully the proposal offered by AT&T in this proceeding (Tr. 40, at 123-124).

7. The Supreme Court did not address the FCC's rules that required ILECs to combine network elements for competitors. See 47 C.F.R. § 51.315(c)-(f). The Eighth Circuit ruling vacating those rules was not on appeal, and those rules remain vacated.

8. The Supreme Court made other rulings affecting UNEs. The Supreme Court affirmed the FCC's authority to design a pricing method for UNEs, and upheld the FCC's refusal to impose a facilities-ownership requirement for access to UNEs. AT&T Corp. at 17, 25.

9. Bell Atlantic further maintains that the Department should not issue a decision because the positions of the parties in this phase of the proceeding were grounded on the now-vacated FCC unbundling rules, and on a set of facts and assumptions that no longer control (Bell Atlantic Comments at 6).

10. Bell Atlantic states that it is willing to continue to offer the collocation "enhancements" detailed in its April 17, 1998 filing (which is the subject of this proceeding), as well as two UNE combinations included in that filing, until the FCC acts (Bell Atlantic Comments at 4, 7).

11. The UNE platform refers to a combination of UNEs necessary to provide complete service to a retail customer and includes the loop and switch network elements.

12. The TELRIC, or Total Element Long-Run Incremental Cost, method was adopted by the FCC as the appropriate method for pricing UNEs.

13. AT&T and MCI WorldCom also argue that the Department has the authority to require Bell Atlantic to provide network elements identified by the Department (AT&T Reply Comments at 8, citing 47 C.F.R. § 51.317; MCI Reply Comments at 5).

14. Bell Atlantic shall not dissemble or make unavailable to CLECs already-combined UNEs where doing so would thwart the intent of this directive. For example, if a customer served by a Bell Atlantic UNE platform discontinues service, Bell Atlantic may not disassemble or make unavailable that UNE platform for use by another customer taking service from that CLEC or another CLEC.

15. Unless otherwise determined, the price for a particular set of pre-combined UNEs would be the sum of the prices for the individual UNEs which make up the combination. See AT&T Corp. at 26.